TNT Logistics North America, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Region 2-B, and its Local 101. Cases 8–CA–34896 and 8–CA–35037

April 8, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel in this case seeks a default judgment on the ground that the Respondent has failed to file a timely answer to the amended consolidated complaint. Upon a charge filed by the Union in Case 8–CA–34896 on March 11, 2004, and a charge filed by the Union in Case 8–CA–35037 on May 6, 2004 and amended on October 27, 2004, the General Counsel of the National Labor Relations Board issued an amended consolidated complaint on October 29, 2004, against TNT Logistics North America, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges, amended charge, and amended consolidated complaint, the Respondent failed to file a timely answer.

On February 17, 2005, the General Counsel filed a Motion for Default Judgment with the Board. On February 23, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 24, 2005, the General Counsel filed a Supplement to Motion for Default Judgment, stating that on February 22, 2005, the Respondent filed with the Region an untimely answer to the complaint. No response to the General Counsel's Motion for Default Judgment or Supplement to Motion for Default Judgment, or to the Board's Notice to Show Cause was filed with the Board.

Ruling on the Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended consolidated complaint affirmatively states that unless an answer is filed on or before November 12, 2004, the allegations in the complaint may, pursuant to a motion for default judgment, be found by the Board to be true. No answer was filed by November 12, 2004. The undisputed allegations in the Motion for Default Judgment disclose that the Region, by letter dated January 12, 2005, by facsimile, notified the Respondent that unless an answer was received by January 24, 2005, a Motion for Default Judgment would be filed. No answer or request for an extension of time was filed by January 24, 2005.

As set forth above, on February 22, 2005, after the filing of the General Counsel's February 17, 2005 Motion for Default Judgment, the Respondent filed with the Region an answer to the complaint. The answer contains no explanation as to why it was untimely filed. Nor was the answer accompanied by a request for leave to file an untimely answer or an explanation as to why the Respondent had not previously sought an extension of time to file an answer. The untimely answer was signed by John D. Webb, the Respondent's Director, Labor & Employee Relations. The undisputed allegations in the Supplement to Motion for Default Judgment aver that Webb is an attorney who has previously, in an unrelated case against the Respondent (Case 8–CA–33664, et al.), filed a timely answer to a Board complaint.[1]

Although the Board has shown some leniency toward respondents who proceed without benefit of counsel,[2] the Respondent does not contend that it was acting pro se in this case, nor does it attempt to excuse its failure to file a timely answer on that basis. Moreover, even assuming that the Respondent had been acting pro se until February 22, 2005 when its untimely answer was filed, pro se status alone does not establish a good cause explanation for failing to file a timely answer. See, e.g., *Sage Professional Painting Co*., 338 NLRB 1068 (2003). Where a pro se respondent fails to timely answer the complaint allegations despite being reminded to do so, and provides no good cause explanation for its failure to file a timely answer, subsequent attempts to answer the complaint will be denied as untimely. *Lockhart Concrete*, 336 NLRB 956, 957 (2001); *Kenco Electric & Signs*, supra. Here, the Respondent did not answer the complaint allegations until after the Motion for Default Judgment was filed, despite the January 12, 2005 reminder letter and extension of time provided by the Region. Nor did the Respondent, either at the time the untimely answer was submitted or at any subsequent time, provide any explanation whatsoever as to why the answer was not timely filed.

The Respondent has failed to show good cause for its failure to file a timely answer. Accordingly, the answer filed on February 22, 2005, is rejected as untimely and we grant the General Counsel's Motion for Default Judgment.[3]

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[1] The General Counsel attached a copy of this answer to his Supplement to Motion for Default Judgment.

[2] *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998); *Kenco Electric & Signs*, 325 NLRB 1118 (1998).

[3] Member Schaumber agrees with his colleagues that the Respondent has not shown "good cause" for its failure to file a timely answer. See generally his position in *Patrician Assisted Living Facility*, 339 NLRB 1153, 1156–1161 (2003). He also agrees that default judgment is appropriate on the complaint allegations in paragraphs 7 and 9 of the Amended Consolidated Complaint. Regarding paragraph 7, the information requested by the Union is presumptively relevant to the Union's

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with facilities located in Walton Hills and Huron, Ohio, the only facilities involved herein, has been engaged in the interstate transportation of freight. Annually, in conducting its business operations, the Respondent receives gross revenues in excess of $50,000, for the transportation of freight from the State of Ohio directly to points outside of the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers servicing the Lorain Ford and Avon Lake Ford accounts at the Respondent's facilities located in Huron, Ohio, Mansfield, Ohio, Dayton, Ohio, Walton Hills, Ohio, Toledo, Ohio, Dunbar, West Virginia, and Ft. Wayne, Indiana, excluding all office clerical professional employees, guards and supervisors as defined in the Act.

Since about 1994, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from November 22, 2000, to November 21, 2003. Since the contract expired on November 21, 2003, the Respondent and the Union have agreed to abide by the terms of the previous collective-bargaining agreement.

At all material times since about 1994, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the unit.

Since about October 17, 2003, and at all times thereafter, including November 21, 2003, December 22, 2003, January 16, 2004, and March 4, 2004, the Union, by letter, requested that the Respondent furnish the Union with the following information:

> 1. A copy of the present contract of sick and accident insurance benefits; the amount received by each employee per week, and the cost of such plan per month;
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> 2. A copy of the present contract on hospitalization and medical coverage and the monthly premiums for family and single coverage, to include the monthly premium for the past four years.
>
> 3. The amount of life insurance the employees are covered for and the monthly premium paid by the company.

Since in or around the time period of October 17, 2003 through March 4, 2004, the Respondent failed and refused to furnish the Union, in a timely manner, with the information described above.

Since about November 21, 2003 and at all times thereafter, including March 4, 2004, the Union, by letter, requested that the Respondent furnish information relating to the financial condition of the Respondent, including corporate federal tax returns, financial statements, sales

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duties as exclusive collective-bargaining representative of the unit employees. Member Schaumber, however, disagrees with his colleagues that default judgment is appropriate on the allegations in paragraph 8 of the complaint.

Paragraph 8 alleges that the Union requested information "relating to the financial condition of the Respondent" and "correspondence with third-parties relevant to Respondent's claim of financial hardship." Longstanding principles dictate that an employer violates Sec. 8(a)(5) by refusing to provide requested information to substantiate a claim that it cannot afford to agree to bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Nielson Lithographing Co.*, 305 NLRB 697, 700 (1991), enfd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992), the Board distinguished between claims of inability to pay and claims of financial or economic difficulties. The Board reasoned that an "employer who claims only economic difficulties or business losses . . . is simply saying that it does not *want* to pay" while an "employer who claims a present inability to pay . . . is claiming essentially that it *cannot* pay." Id. (emphasis supplied). An unwillingness to pay for a union demand does not trigger an employer's obligation to turn over financial information. *American Polystyrene Corp.*, 341 NLRB No. 67, slip op. at 7 (2004). Though claims of economic or financial hardship could reasonably convey "a present inability to pay," that determination "must be [made] in the context of the particular circumstances [of the] case." Id.

Member Schaumber is of the view that the complaint allegation in paragraph 8 is insufficient to determine whether the Respondent's alleged claim was an inability to pay, in which event the information requested by the Union was relevant, or merely one of financial difficulty, in which event the Respondent had no duty to produce the requested information. Thus, Member Schaumber would not grant default judgment on the allegations in paragraph 8 of the complaint because those allegations do not establish that the Union met its burden to demonstrate that the information requested was relevant to its duties as the employees' representative. See generally his position in *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1228–1230 (2003).

Chairman Battista and Member Liebman disagree with their colleague's refusal to grant default judgment on the allegations of paragraph 8. As in *Artesia Ready Mix Concrete*, supra 339 NLRB at 1225–1227, the central fact in this case is that the Respondent has failed to file a timely answer to the amended consolidated complaint, and has thereby effectively admitted all the complaint allegations. Thus, the Respondent has admitted that all the requested information is "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative" of the unit employees. The Respondent's admission of the relevance of the requested information is sufficient to support an unfair labor practice finding. See, e.g., *Artesia Ready Mix*, supra; *Tower Automotive*, 322 NLRB 499, 500 (1996) (Board granted default summary judgment with respect to union's request for nonunit information where respondent failed to file timely and proper answer to complaint).

and profit (loss) data, current operating budget, management reports, description of intercompany transfers of products and services, capital expenditures and depreciation figures, new order backlogs, current organization chart, correspondence with third-parties relevant to the Respondent's claim of financial hardship, and information relative to bargaining unit labor cost data. Since in or around the time period of November 21, 2003 through March 4, 2004, the Respondent failed and refused to furnish the Union, in a timely manner, with this information.

The information requested by the Union, described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

Since about December 6, 2003, and continuing thereafter, the Respondent has failed to adhere to the grievance/arbitration provisions of the collective-bargaining agreement described above, and by its conduct has repudiated the grievance/arbitration provisions of the collective-bargaining agreement.

CONCLUSIONS OF LAW

1. By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to furnish necessary and relevant information to the Union and by failing to adhere to the grievance/arbitration provisions of its collective-bargaining agreement with the Union, we shall order the Respondent to furnish the Union with the information it requested, and to process any grievances it failed to process pursuant to the contractual grievance/arbitration procedures in the collective-bargaining agreement with the Union.

ORDER

The National Labor Relations Board orders that the Respondent, TNT Logistics North America, Inc., Walton Hills and Huron, Ohio, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with any information it requests that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the Respondent's unit employees.

(b) Repudiating, or failing and refusing to adhere to, the grievance/arbitration provisions of its collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information it requested on October 17, 2003, November 21, 2003, December 22, 2003, January 16, 2004, and March 4, 2004 relating to sick and accident benefits, hospitalization and medical coverage, life insurance, and the Respondent's financial condition.

(b) Adhere to the grievance/arbitration provisions of its collective-bargaining agreement with the Union and process any grievances it failed to process pursuant to those provisions.

(c) Within 14 days after service by the Region, post at its facilities in Walton Hills and Huron, Ohio, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 8, 2005

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish information requested by the Union that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT repudiate, or fail and refuse to adhere to, the grievance/arbitration provisions of our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL furnish the Union with the information it requested on October 17, 2003, November 21, 2003, December 22, 2003, January 16, 2004, and March 4, 2004, relating to sick and accident benefits, hospitalization and medical coverage, life insurance, and our financial condition.

WE WILL adhere to the grievance/arbitration provisions of our collective-bargaining agreement with the Union and WE WILL process any grievances we failed to process pursuant to those provisions.

TNT LOGISTICS NORTH AMERICA, INC.